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### Judicial Ethics: A New Paradigm for a New Era

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# ARTICLE

*Charles Gardner Geyh*

## Judicial Ethics: A New Paradigm for a New Era

**Abstract.** As the preamble to the Model Code of Judicial Conduct indicates, traditional notions of judicial ethics operate within a rule of law paradigm, which posits that the “three I’s” of judicial ethics—*independence, impartiality, and integrity*—enable judges to uphold the law. In recent decades, however, social science, public opinion, and political commentary suggest that appointed judges abuse their independence by disregarding the law and issuing rulings in accord with their biases and other extralegal impulses, while elected judges disregard the law and issue rulings popular with voters, all of which calls the future of the three I’s and judicial ethics itself into question. The time has come to rethink the role of judicial ethics in light of a new legal culture paradigm that better accommodates changing conceptions of the judicial role.

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### I. INTRODUCTION

In 1906, the American judiciary was under siege. Populists and Progressives were furious with the nation’s courts for impeding their agenda by invalidating laws regulating the workplace.<sup>1</sup> And so, they proposed to terminate judicial review, end life tenure, subject federal judges to popular election, remove disfavored state judges via recall elections, and impeach judges who stood in their way.<sup>2</sup>

That is when Roscoe Pound—a relatively obscure Nebraska law professor—took the podium at the annual meeting of the American Bar Association and delivered a keynote address entitled “The Causes of

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1. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM 77 (2006).

2. *Id.* at 77–78.

Popular Dissatisfaction with the Administration of Justice.”<sup>3</sup> That speech marked a pivotal point in the history of the American judiciary because it catalyzed a reform movement within the bench and bar that revised court practice, procedure, selection, and administration in ways that refit the judiciary for the twentieth century and helped quiet roiling anger toward the courts.<sup>4</sup> Today—over a century later—the American judiciary is in peril again, a consequence of changes generations in the making. The time has come to retool our courts for the twenty-first century.

The American judiciary is undergoing a period of dramatic, perhaps unprecedented, change—a new politics challenges the continuing vitality of the rule of law paradigm which has guided the courts for centuries. In this article, I begin by describing the new politics which have given rise to a series of emerging issues. I then highlight the ways in which this changing landscape requires us to rethink judicial ethics and the role of the courts, to the end of revising the paradigm within which the judiciary operates. Armed with a new paradigm, I conclude with a search for solutions by focusing on steps the bench and bar can take to address the challenges they face.

## II. EMERGING ISSUES

### A. *The New Politics of the American Judiciary*

The American judiciary has long been governed by the rule of law paradigm, which disavows claims that the craft of judging is sullied by politics.<sup>5</sup> It posits that if judges are afforded independence from external interference with their judgment, then they will bracket out extralegal influences and impartially uphold the law.<sup>6</sup> Justice Stephen Breyer’s observation is illustrative: “[J]udicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government.”<sup>7</sup> Chief Justice Roberts made a closely related point during

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3. Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 874 n.15 (2007).

4. *Id.* at 874–77.

5. See CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 19 (2016) (“Reduced to its essence . . . the rule of law paradigm envisions a government of laws established (directly and indirectly) by the governed, that an independent judiciary, unsullied by extralegal influences, interprets and applies, subject to limited accountability.”).

6. *Id.*

7. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L. J. 989, 989 (1996).

his confirmation testimony when he likened judges to umpires who just call balls and strikes—who apply but do not make the rules.<sup>8</sup> The rule of law paradigm grudgingly concedes the need to keep judicial independence in check by holding judges accountable to “the law,”<sup>9</sup> but it is a parsimonious kind of accountability that the paradigm envisions, limited largely to the strictures of a judge’s conscience and the appellate process.

The legal realism movement of the 1920s and 1930s challenged nineteenth century formalism and the notion that law is a fixed body of rules for judges to apply with mathematical precision<sup>10</sup>—a notion Jerome Frank derided as “the Santa Claus story of complete legal certainty.”<sup>11</sup> In the 1940s, Supreme Court justices began issuing concurring and dissenting opinions with greater frequency.<sup>12</sup> This development provided a new school of political scientists with a source of data to show that, when faced with the legal indeterminacy the Realists had exposed, the votes justices cast tended to align with their preexisting ideological preferences or attitudes.<sup>13</sup> In a 2003 study, a variation of this so-called “attitudinal model” did a better job than legal experts at predicting how the Supreme Court would decide cases in its upcoming term, with the model correctly predicting 75% of the time, as compared to 59% for the experts.<sup>14</sup> Other scholarship has shown

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8. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) (“[M]y view [is] that a certain humility should characterize the judicial role. Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them.”).

9. See Sandra Day O’Connor, *Foreword* to JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* (Charles Hall ed., 2010) (“We all expect judges to be accountable to the law rather than political supporters or special interests.”); Kay McFarland, *Kansas and Missouri Chief Justices Address Judicial Conferences*, J. KAN B. ASS’N, Nov.–Dec. 2005, at 9, 12 (“In each individual case, we are accountable to the law and not to the popular will.”); Debra Cassens Weiss, *ABA President Decries Expensive Judicial Races*, ABA J. (Nov. 6, 2008, 6:52 PM), [http://www.abajournal.com/news/article/aba\\_president\\_decries\\_expensive\\_judicial\\_races/](http://www.abajournal.com/news/article/aba_president_decries_expensive_judicial_races/) [<https://perma.cc/X7GR-NK2Q>] (“Judges should be accountable to the law and the Constitution, not the whims of the day or to popular public opinion.”).

10. Carla Faralli, *The Legacy of American Realism*, 48 SCANDINAVIAN STUD. L. 75, 75 (2005).

11. JEROME FRANK, *LAW AND THE MODERN MIND* 244 (1930).

12. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 780 (2015).

13. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 17, 62 (1993).

14. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1171 (2004).

that the influence of preexisting ideology is less prevalent in the circuit and district courts, but nonetheless measurable.<sup>15</sup>

At the same time the science of judicial politics was coming into its own, the judicial appointments process was undergoing a political transformation. Beginning in the late nineteenth century, Supreme Court confirmation proceedings gradually shifted their focus toward the ideological orientation of the nominee's future decision-making, culminating in the 1986 rejection of Reagan nominee Robert Bork, orchestrated by Senate Democrats.<sup>16</sup> In the years since, Senators from both political parties have increasingly made the nominee's ideological orientation the centerpiece of confirmation proceedings for the Supreme Court, circuit court, and district court levels.<sup>17</sup> Senate rules which historically served to promote consultation, deliberation, and consensus in the confirmation process became tools of obstruction and were either marginalized or withdrawn.<sup>18</sup> In late 2017, the Federalist Society proposed to capitalize on this streamlined appointments process by doubling the size of the circuit courts and packing them with ideological soul mates to blunt the impact of Obama-era appointments.<sup>19</sup>

The mainstream media reinforce this emerging conception of the federal judiciary as an amalgamation of ideologically driven voting blocs by explaining Supreme Court rulings in terms of the ideological alignments of the majority and dissent.<sup>20</sup> Lower court decisions are just as often explained

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15. GEYH, *supra* note 5, at 53–54.

16. GEYH, *supra* note 1, at 203, 205.

17. *Id.* at 216–22.

18. *Id.* at 221.

19. See Memorandum from Prof. Steven G. Calabresi & Shams Hirji, Nw. Univ. Pritzker School of Law, to the United States Senate and House of Representatives 1 (Nov. 7, 2017), <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf> [<https://perma.cc/B94Z-KT26>] (“With Republican control over the federal government now, the 115th Congress has a rare opportunity to remedy this grave problem by passing a judgeship bill that would greatly expand the size of the circuit and district courts. Furthermore, it could accomplish this in a cost-effective manner by abolishing 158 of the most powerful administrative law judges and replacing them with Article III Administrative Law Judges; this would also help restore the separation of powers and rule of law to agency adjudications. In doing so, Congress could achieve another important reform: undoing the judicial legacy of President Barack Obama.”).

20. See, e.g., Ariane de Vogue & Veronica Stracqualursi, *Supreme Court Upholds Travel Ban*, CNN (June 27, 2018, 1:02 AM), <https://www.cnn.com/2018/06/26/politics/travel-ban-supreme-court/index.html> [<https://perma.cc/4DTX-NEHL>] (“The Supreme Court has upheld President Donald Trump’s travel ban. The ruling was 5-4 along partisan lines, with Chief Justice John Roberts writing for the conservative majority.”).

with reference to the partisan affiliation of the President who appointed the judge issuing the ruling.<sup>21</sup>

These developments have not been lost on the public. Approximately eighty percent of the public now thinks that judges are influenced by their partisan backgrounds and ideological preferences.<sup>22</sup> Approximately 58% agree with the statement: “Judges always say that their decisions are based on the law and the Constitution, but in many cases judges are really basing their decisions on their own personal beliefs.”<sup>23</sup> Survey data further shows that the public is unperturbed by judges who are influenced by their own views of justice and fairness, but is troubled by judges whom it perceives as naked political actors.<sup>24</sup> As a consequence, heated confirmation battles in which each political party has portrayed the other’s nominees as ideological zealots have diminished public confidence in the courts.<sup>25</sup> Corroborative of this point, public confidence in the Supreme Court recently reached an all-time low in the thirty-year history of the Pew public confidence survey.<sup>26</sup>

In state systems, where nearly 90% of judicial officers stand for elections of some kind, there is a new politics of judicial selection that has rendered judicial elections “noisier, nastier, and costlier” beginning in the late 1970s.<sup>27</sup> Judicial races morphed into referenda on the wisdom of judicial

21. See, e.g., *E. Bay Sanctuary Covenant v. Trump*, No. 18–cv–06810–JST, 2018 WL 6053140, at \*1 (N.D. Cal. Nov. 19, 2018) (“Whatever the scope of the President’s authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden.”).

22. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 221 (2012).

23. *Law and Courts Questions from 2005 Poll*, CAMPBELL PUB. AFFAIRS INST. (2005), [http://www.maxwell.syr.edu/uploadedFiles/campbell/data\\_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf](http://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/Law%20and%20Courts%20Questions%20from%202005%20Poll.pdf) [<https://perma.cc/Y4AL-RCU3>].

24. See James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 L. & SOC’Y REV. 195, 208 (2011) (“Those who believe that judges are politicians are more likely to perceive discretionary decisionmaking, but those more likely to perceive discretionary decisionmaking are not necessarily more likely to view judges as politicians.”).

25. *Confidence in Institutions*, GALLUP (2016), <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/HM6T-6M4D>] (illustrating a negative regression for Americans expressing either a “Great deal” or “Quite a lot” of confidence in the Supreme Court from 1984 to 2018).

26. *Negative Views of Supreme Court at Record High, Driven by Republican Dissatisfaction*, PEW RESEARCH CTR. (July 29, 2015), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2015/07/07-29-2015-Supreme-Court-release.pdf> [<https://perma.cc/HLJ3-4YVP>] (stating 43% of Americans have an unfavorable opinion of the Supreme Court).

27. Roy A. Schotland, Comment, 61 L. & CONTEMP. PROBS. 149, 150 (1998); see generally, CHARLES GARDNER GEYH, WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA’S JUDGES 50 (2019) (footnote omitted) (“[W]hat has happened is a series of developments in judicial politics that have altered the judicial selection landscape and rendered

rulings on crime, capital punishment, abortion, same-sex marriage, water rights, and tort reform, among other issues.<sup>28</sup> In an effort to manipulate the ideological orientation of state supreme courts, interest groups poured money into judicial campaigns via direct contributions and independent expenditures on the candidate's behalf, giving rise to the widespread perception that judges were influenced by the financial support they received, if not "for sale."<sup>29</sup>

The new politics of the American judiciary has also worked its way into judicial practice and procedure. Partisan alignments formed over such questions as whether judges should have the discretion to dismiss complaints that their common sense and judicial experience tell them are implausible, how stringent the standards should be for imposing sanctions on lawyers and parties who file lawsuits judges deem frivolous, and how exacting the rules should be for certifying class actions.<sup>30</sup> The new politics of practice and procedure are closely related to an emerging politics of expense and delay. Business-friendly interest groups have sought to curb discovery and other processes they regard as the costly excesses of a civil litigation system gone pear-shaped.<sup>31</sup> Consumer friendly interest groups responded that such measures restrict plaintiffs' access to justice.<sup>32</sup> And, there is a new politics of judicial disqualification in which interest groups on the left and right have trumpeted information challenging the impartiality of justices and judges unlikely to support their cause in the hopes of compromising their credibility and securing their recusal.<sup>33</sup>

#### B. *Erosion of the "Three I's"*

The new politics challenges both the rule of law paradigm and the foundational assumption that our judges possess three attributes essential to good judging: impartiality, independence, and integrity—the three I's of judicial conduct and ethics. Impartiality is a cornerstone of the rule of law

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judicial elections 'noisier, nastier and costlier,' to borrow the widely quoted phrase of a long-time observer of judicial races. The net effect of these developments has been to fuel arguments for and against alternative selection systems, with the engines of political and economic power set against each other in ways that have thwarted momentum in any one direction.'").

28. GEYH, *supra* note 27, at 52.

29. *Id.* at 67–72.

30. GEYH, *supra* note 5, at 34–35.

31. *Id.* at 35.

32. *Id.*

33. *Id.* at 38.



paradigm.<sup>34</sup> It is commonly defined as open-mindedness and the absence of bias toward parties before the court.<sup>35</sup> When the nation was in utero, Blackstone wrote “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”<sup>36</sup> This ironclad presumption was not a finding of fact. The public has never really believed that judges are categorically immune to bias.<sup>37</sup> Rather, it was an irrebuttable presumption of a sort that Keith Bybee characterized as an “acceptable hypocrisy.”<sup>38</sup> It embodies our aspirations for the courts and legitimizes the role judges play in the rule of law, which works as long as we internalize the presumption as an article of faith and look the other way when confronted with facts that contradict it.

In the new politics, however, the public is no longer looking the other way—this once acceptable hypocrisy is becoming unacceptable.<sup>39</sup> If judges are perceived as brazen political actors driven by the desire to satiate their ideological appetites or win reelection, the pretense of open-mindedness goes out the window along with the absence of bias toward classes of litigants whose positions are at odds with the ideological preferences of the judge or the voters.

Moreover, the problem does not end with political ideology. Social science research has shown that judges, like the rest of us, are subject to implicit racial bias.<sup>40</sup> In the aftermath of the Supreme Court’s decisions in *Twombly*<sup>41</sup> and *Iqbal*,<sup>42</sup> which authorized judges to dismiss actions they deemed “implausible” in light of their “common sense,”<sup>43</sup> research has shown that white judges are significantly more likely to dismiss race

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34. *Id.* at 65.

35. MODEL CODE OF JUD. CONDUCT Terminology (AM. BAR ASS’N 2018).

36. 3 WILLIAM BLACKSTONE, COMMENTARIES \*361.

37. Geyh, *supra* note 22, at 220–21.

38. KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 5 (2010).

39. Geyh, *supra* note 22, at 222.

40. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210 (2009).

41. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

42. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

43. *See id.* at 679 (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”); *Twombly*, 550 U.S. at 556 (“Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”).

discrimination cases than their black counterparts.<sup>44</sup> Meanwhile, African-Americans report significantly lower rates of confidence in the impartiality of judges than their European-American counterparts.<sup>45</sup>

If independence is seen to liberate judges to impose their ideological and other biases rather than uphold the law, one obvious solution is to constrain the second “I”: independence. Recent research by Brandon Bartels and Chris Johnston shows that when judicial decision-making is viewed in partisan, polarized terms, public support for judicial independence wears thin and receptivity to court-curbing increases measurably.<sup>46</sup> At the same time, as trial rates drop below 2%,<sup>47</sup> and judges begin to look less like umpires than case managers and problem solvers, some have begun to question the continuing need for judicial independence from political controls to which administrators in the so-called “political” branches are subject.<sup>48</sup>

The ongoing assault on judicial impartiality and independence inflicted collateral damage on the third “I”: integrity. If, as critics claim, judges are renegade politicians in robes who profess to be impartial as a subterfuge, then they are frauds who make a mockery of their oaths. Nowhere is this sentiment more evident than in President Trump’s criticism of “so-called judges,” whom he derided as “political,” and “disgraceful,” for issuing orders impeding his administration’s agenda.<sup>49</sup> It bears emphasis that these

44. Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 5 (2011).

45. DAVID B. ROTTMAN ET AL., NAT’L CTR. FOR STATE COURTS, PERCEPTIONS OF THE COURTS IN YOUR COMMUNITY: THE INFLUENCE OF EXPERIENCE, RACE AND ETHNICITY, FINAL REPORT 10 (2003), <http://www.ncjrs.gov/pdffiles1/nij/grants/201302.pdf> [<https://perma.cc/WB9V-3EJT>].

46. See generally BRANDON BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE (forthcoming 2019) (manuscript at 6–7) (on file with author) (“Thus, for both the left and right, actions that threaten the Court’s power have become fair game. . . . [O]ur book’s theory and empirical findings—focusing on when and why the public supports such attacks on the Court—have important implications for the extent of the Court’s legitimacy and ultimately its independence and power in the political system. In this sense, our work can inform debates over possible changes to the Court and its role in American politics.”).

47. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS 1 (2018) (reporting the average federal district judge faced 575 total filings with only 16 completed trials, producing a trial rate of approximately 2%).

48. Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 669–70 (1999).

49. See *In His Own Words: The President’s Attacks on the Courts*, BRENNAN CTR. FOR JUSTICE (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> [<https://perma.cc/85N4-9NPX>] (outlining President Trump’s “troubling pattern of attacking judges

attacks transcend blunt disagreements over the interpretation of applicable law. Indeed, the President's foregoing criticism of the courts has never alluded to applicable law. Rather, these assaults on the integrity of our nation's trial courts give voice to a constituency that harbors grave reservations about the legitimacy of an independent judiciary, and the rule of law paradigm.

### C. *The "Civics" Problem*

The bench and bar view these and related developments with alarm. They commonly attribute the new politics to public ignorance.<sup>50</sup> They point to studies showing that fewer than 20% of Americans can name the three branches of government—fewer, one infamous survey reported, than can name the Three Stooges.<sup>51</sup> Two-thirds of the public cannot identify a single member of the U.S. Supreme Court, and fewer than 3% of American teenagers can identify the Chief Justice.<sup>52</sup> As a consequence, the argument goes, the public attacks judges when they make unpopular rulings because the public is too ill-informed to understand that judges have a duty to exercise judicial review and protect the ultimate will of the people, as embodied in the Constitution, from encroachment by temporary majorities. The antidote, the bench and bar commonly argue, is to return civics to school classrooms.<sup>53</sup>

There is evidence to suggest that the findings of these public ignorance

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and the courts for rulings he disagrees with"); Amy B. Wang, *Trump Lashes Out at 'So-Called Judge' Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm\\_term=.5bc0033de6f1](https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.5bc0033de6f1) [<https://perma.cc/3VNK-JXS5>] (describing President Trump's criticism of "a federal judge's decision to temporarily block enforcement of his controversial travel ban").

50. See, e.g., Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553, 555 (2013) ("Today's judicial elections, characterized by record-high spending and aggressive media campaigns, threaten judges' ability to remain independent and impartial on the bench. At the same time, the voters, ignorant of judicial decisions and misled by deceptive television advertising, are unable to hold judges accountable for erroneous decisions, clear bias, or even unethical conduct.").

51. *Id.* at 566.

52. *Id.* at 566–67.

53. See, e.g., Michelle A. Behnke, *Judicial Independence: Civic Education is Key*, ABA (June 15, 2017), [https://www.americanbar.org/groups/bar\\_services/publications/bar\\_leader/2006\\_07/3102/civiced.html](https://www.americanbar.org/groups/bar_services/publications/bar_leader/2006_07/3102/civiced.html) [<https://perma.cc/XE6R-QAV7>] (highlighting the importance of educating youth and the general public about the judicial branch and process and suggesting lawyers volunteer to educate their communities).

studies are exaggerated,<sup>54</sup> although not so exaggerated as to discredit the underlying concern. But the bench and bar's fixation on public ignorance misses a larger point. The new politics challenges the rule of law paradigm. The vast majority of the public thinks that judges take the law seriously but are subject to ideological and other extralegal influences, demonstrating increasing skepticism of the old rule of law bromide that independent judges are influenced by the facts, law, and nothing else.<sup>55</sup> On that point, the public's suspicion is grounded not in civics illiteracy, but social science.<sup>56</sup>

In short, the public has been told two stories. There is the bench and bar's tired rule of law paradigm—that judges apply rules of law like umpires call balls and strikes, impervious to ideological and other influences; and there is the competing view, which found voice with the President, that judges are little more than politicians in robes. As the public contemplates these alternatives, the bench and bar have been bellowing in the ear of anyone who will listen that if you don't buy the rule of law paradigm—which social science has shown to be overstated—it is because you are ignorant. This may be a counterproductive marketing strategy in a political environment where the segment of the public that the bench and bar need most to reach has become aggressively anti-elitist.

#### D. *The Rise of Anti-Elitism*

Widespread distrust of the federal government in the aftermath of the Vietnam War and Watergate begat the Reagan revolution, in which President Reagan positioned himself as an outsider campaigning against the Washington bureaucracy that he himself would lead.<sup>57</sup> In the years since, antagonism toward government has deepened to the point where candidates for public office have found that meaningful job experience in government is less an asset to be advertised than a liability to be downplayed.<sup>58</sup> This

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54. See, e.g., James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POL. 429, 433 (2009) ("In 2001, nearly three out of four [Americans] knew that the justices of the [Supreme] Court are appointed; and . . . more than 60% answered that the Supreme Court has the ultimate 'say' on the Constitution. Only 13.6% of the respondents got none of these questions correct; 44.4% answered all three accurately.").

55. GEYH, *supra* note 5, at 53–55.

56. See *supra* Part B (focusing on how, in practice, judges may not be as impartial as the rule of law paradigm would suggest).

57. SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY 1974–2008* 4–7 (2008).

58. See Magali Sarfatti Larson & Douglas Porpora, *The Resistible Rise of Sarah Palin: Continuity and Paradox in the American Right Wing*, 26 SOC. F. 754, 764 (2011) ("Unlike wealth, intellect and education seem associated, to less educated minds, with a belief that the more educated feel superior, and think

distrust of government insiders is part of a larger, long-gathering wave of anti-elitism that has contributed to a deeply polarized public in which significant segments of the electorate distrust the role of expertise in public life, manifesting in a rejection of science, a hostility toward higher education, and fears of renegade judges running amok.<sup>59</sup>

In the absence of electoral accountability, public confidence in the federal judiciary depends on the perception that judges are uniquely qualified to uphold the rule of law by virtue of their legal training, expertise, and commitment to the three I's. But in a political environment where the judiciary's commitment to the three I's is being challenged and expertise is the object of anti-elitist scorn, the judiciary's position is more precarious. Exhibit A in this new wave of anti-elitism is President Trump's recent forays into nominating some judges who lack the litigation experience and practice credentials traditionally required of judicial nominees.<sup>60</sup> The legitimacy of judges so selected can rely neither on their accountability to voters nor on their special qualifications and expertise. Rather, their legitimacy is left to dangle from the thread of the electorate's political support for the President and Senate who appointed them—support that is notoriously fickle.

#### E. *The Perils of an Information Age*

The rise of anti-elitism is driven in part by an information age in which the universe of human knowledge is available to anyone with access to a smart phone. Who needs fancy-pants doctors, lawyers, and investment

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they can tell common folk how to behave or teach them how things are. Those with higher education appear as self-appointed models, and are seen as elitist.”); Beverly Gage, *How ‘Elites’ Became One of the Nastiest Epithets in American Politics*, N.Y. TIMES MAG., Jan. 3, 2017, <https://www.nytimes.com/2017/01/03/magazine/how-elites-became-one-of-the-nastiest-epithets-in-american-politics.html> [<https://perma.cc/DFU9-N84M>] (“[A]s a noun, embodied by actual living people, [‘elite’] has become one of the nastiest epithets in American politics. . . . In this formulation, elites are a destructive, condescending collective, plotting against the beleaguered masses outside their ranks.”).

59. See *Sharp Partisan Divisions in Views of National Institutions*, PEW RESEARCH CTR. (July 2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/07/11101505/07-10-17-Institutions-release.pdf> [<https://perma.cc/BN6H-T356>] (providing statistics reflecting a growing trend of negative perceptions toward colleges and universities).

60. See, e.g., Kristine Phillips, *He Has Never Tried a Case, but Trump Wants to Make Him Judge for Life*, WASH. POST (Nov. 12, 2017), [https://www.washingtonpost.com/news/politics/wp/2017/11/12/he-has-never-tried-a-case-but-trump-wants-to-make-him-judge-for-life/?utm\\_term=.55938518d666](https://www.washingtonpost.com/news/politics/wp/2017/11/12/he-has-never-tried-a-case-but-trump-wants-to-make-him-judge-for-life/?utm_term=.55938518d666) [<https://perma.cc/PGR7-R9E4>] (“Talley is the latest federal judicial nominee to draw scrutiny for what some say is his limited experience in practicing law and the level of partisanship he had shown on social media, on his political blog and on several opinion pieces he had written for CNN. He has also received a ‘not qualified’ rating from the American Bar Association, which vets federal judicial nominees.”).

analysts when I can diagnose my own diseases, do my own legal research, and trade my own stocks on line? The information age has caused a fundamental shift in how we receive and share information about the courts. Traditional, mainstream news outlets are dying for want of revenue and viewership.<sup>61</sup> Taking their place is a twenty-four hour news cycle with cable news pundits and Internet journalists reporting on issues that would never have seen the light of day before—issues that run the gamut from information judges include in their financial disclosures,<sup>62</sup> to problematic rulings in remote corners of the country,<sup>63</sup> to episodes of alleged misconduct.<sup>64</sup> Witness, for example, the speed and manner in which allegations of sexual harassment against Judge Alex Kozinski by his former female clerks were reported, disseminated, and resolved with his resignation.<sup>65</sup>

Moreover, this new cadre of cable news and citizen journalists is often ideologically aligned and unencumbered by professional norms that regulate the mainstream media. The “fake news” nom de guerre has emerged as a two-edged sword to expose junk news and to discredit truthful news by besmirching it as junk.<sup>66</sup> A sobering MIT study of Twitter has found that

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61. *Newspapers Fact Sheet*, PEW RESEARCH CTR. (June 13, 2018), <http://www.journalism.org/fact-sheet/newspapers/> [https://perma.cc/5U7M-8VBV].

62. See, e.g., Reity O'Brien et al., *Information on Judges' Disclosures Often Blacked Out*, CTR. FOR PUB. INTEGRITY, <https://publicintegrity.org/federal-politics/information-on-judges-disclosures-often-blacked-out/> [https://perma.cc/T5YE-TCZN] (last updated May 19, 2014, 12:19 PM) (“If visible, the blacked-out information would include details about gifts they received, income they earned[,] and investments they held.”).

63. See, e.g., Corin Cates-Carney, *Judge Strikes Down Montana's Campaign Contribution Limits*, MONTANA PUB. RADIO (May 17, 2016), <https://www.mtpr.org/post/judge-strikes-down-montanas-campaign-contribution-limits> [https://perma.cc/GC8U-9BCK] (critiquing a federal court's decision that ruled Montana's campaign contribution limits are unconstitutional).

64. See, e.g., Ann E. Marimow & Robert Barnes, *Judiciary Dismisses 'Serious' Misconduct Complaints Against Brett M. Kavanaugh*, WASH. POST (Dec. 18, 2018), [https://www.washingtonpost.com/local/legal-issues/judiciary-dismisses-serious-misconduct-complaints-against-brett-m-kavanaugh/2018/12/18/f55416b0-0301-11e9-b6a9-0aa5c2fcc9e4\\_story.html?utm\\_term=.0a22171f1633](https://www.washingtonpost.com/local/legal-issues/judiciary-dismisses-serious-misconduct-complaints-against-brett-m-kavanaugh/2018/12/18/f55416b0-0301-11e9-b6a9-0aa5c2fcc9e4_story.html?utm_term=.0a22171f1633) [https://perma.cc/MC5T-MAZ2] (reporting the historic dismissal of Justice Kavanaugh's alleged misconduct).

65. See, e.g., Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegation*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [https://perma.cc/JNK2-9FRG] (discussing Judge Alex Kozinski's decision to retire after the Ninth Circuit “began a misconduct inquiry prompted by . . . accusations from six women against [Judge] Kozinski” followed by “allegations from nine more women”).

66. Preet Bharara, *The Truth is Hard. But for a New York Times Lawyer, Defending it is Fun*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/books/review/david-mccraw-truth-in-our-times.html> [https://perma.cc/V348-5TJE] (“It was an astonishing thing to witness—an iconic news organization feeling the need to hawk not the quality of its writing and

junk news—by virtue of its novelty and sensationalist tone—is disseminated much more widely than truthful news.<sup>67</sup> And unlike the traditional evening news and morning paper, which the public watched or read together, Internet and cable news target ideologically aligned audiences in segregated echo chambers, who process the news—truthful and junk alike—in ways that confirm their preexisting prejudices, contribute to polarization, and complicate the ability of the bench and bar to counter lurid stories of activist judges run amok.<sup>68</sup>

### III. TOWARD A NEW PARADIGM

Throughout its history, the judiciary has responded to cycles of intense political hostility by hunkering down and keeping still. For a branch of government that seeks to distance itself from the political fray, this strategy of freezing like a rabbit in the briar patch until the coyotes pass has served the judiciary long and well. But the developments I describe here transcend cycles—they are generations in the making. These changes have pruned the briars back and left the rabbit exposed, which makes perilous the time-honored impulse to sit tight.

The rule of law paradigm, which lionizes judges as impartial apostles of law impervious to extralegal influences, is crumbling. If we do nothing, it is destined to be replaced with a more hostile vision of judges as politicians in robes, who are undeserving of independence from popular and political control. As the new politics of the American government enters middle age with no signs of abating, the time has come to transition away from the ailing rule of law paradigm.<sup>69</sup> In its stead, I propose a legal culture paradigm, which presents the judiciary in a more honest and accurate light that social science can corroborate, the bench and bar can defend, and the public can support. As described in the paragraphs that follow, transitioning to the

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reporting, but the most fundamental virtues of its entire industry's mission. Like truth. And knowledge. Values thought to be long settled. Merely having your business model enshrined in the First Amendment to the Constitution is no longer sufficient; now you need airtime . . . to respond to crude and corrosive attacks on the free press by a president and his supporters with their incessant charges of 'fake news!'"

67. Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018).

68. David Robert Grimes, *Echo Chambers Are Dangerous—We Must Try to Break Free of Our Online Bubbles*, GUARDIAN (Dec. 4, 2017, 6:27 PM), <https://www.theguardian.com/science/blog/2017/dec/04/echo-chambers-are-dangerous-we-must-try-to-break-free-of-our-online-bubbles> [https://perma.cc/QS6U-KU52].

69. GEYH, *supra* note 5, at 53–55.

legal culture paradigm that I advocate is less of a complete overhaul than a modest but meaningful pivot—a new way of looking at old ideas that can better accommodate our conception of the American judiciary in the twenty-first century.

The core premise of the legal culture paradigm is that, beginning the first week of law school, judges are immersed in a legal culture that takes law seriously. But beginning that same week, future judges learn that, in hard cases, the law and facts are often indeterminate. Such indeterminacy must be resolved with reference to competing precedent and policy arguments that the adversarial process elicits. The students who bring different policy perspectives to bear in tough cases are not disregarding the law; they are struggling to ascertain what the law is and the purpose behind it. They are learning to think like lawyers.

These same students then embark on a career devoted to parsing facts and law for the benefit of their clients. By the time they ascend to the bench, these lawyers have been steeping in the law for decades. To suggest that they shed their commitment to the rule of law like a snake skin the moment that they don the robe is absurd. However, it is likewise absurd to deny that, in difficult cases, judges have to exercise discretion and judgment—discretion and judgment that can be informed by the judge's background, education, life experience, ideology, race, gender, religion, and other extralegal factors.

The rule of law paradigm clings tenaciously to the fiction that judges are impervious to these extralegal influences because its defense of an independent judiciary depends on the claim that independent judges follow the law and nothing else. But judicial independence can more readily be defended in the context of a more realistic legal culture paradigm.

First, even if judges are subject to extralegal influences at the margins, we need an independent judiciary because when the law is relatively clear—which is most of the time—judges are acculturated to follow the substantive law and will do so as long as they are not intimidated into doing otherwise. Second, in hard cases, when a judge's interpretation of substantive law is subject to extralegal influences, judicial independence promotes procedural justice for litigants. Studies show that parties will accept adverse substantive outcomes if they feel that they were treated fairly.<sup>70</sup> Judges are acculturated to follow procedural rules that afford litigants a fair hearing, and will do so

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70. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience*, 18 L. & SOC'Y REV. 51, 69–70 (1984).



if they are not under pressure to railroad parties to reach dictated outcomes.<sup>71</sup> Third, even when their interpretations of facts and law are subject to extralegal influences, independence enables judges to give us their best assessment of what the applicable facts and law are, as they are acculturated to do. That is decidedly better than having dependent judges disregard operative facts and law to issue outcome-oriented rulings calculated to appease those who control them. Viewed in that light, the life experience judges bring to bear when resolving hard cases manifests wisdom in the pursuit of justice—not judging gone rogue.

If we acknowledge that independent judges are subject to extralegal influences, however, we must also concede the risk that wayward judges could abuse their power by disregarding the law they are acculturated to follow and imposing their own will. To guard against that possibility, the legal culture paradigm envisions a somewhat more robust role for judicial accountability to keep independence in check by means of appeal, mandamus, statutory overrides, constitutional amendments, media scrutiny, rigorous vetting in the appointments process, disqualification, and in appropriate cases, judicial discipline or impeachment. This heightened focus on judicial accountability envisioned by a legal culture paradigm calls for a renewed focus on judicial ethics as a means for the judiciary to manage these unavoidable, extralegal influences on judicial discretion and judgment. *Legal Ethics, Professional Responsibility, and the Legal Profession* offers such a focus.<sup>72</sup>

The Model Code of Judicial Conduct is replete with rules and commentary that link the need to constrain extralegal influences to the judiciary's legitimacy while acknowledging the inevitability of those same influences. The Code speaks in terms of a judge's duty to "act at all times in a manner that promotes public confidence" in judicial impartiality, independence, and integrity,<sup>73</sup> which underscores the relationship between the three I's of judicial ethics and public perception of the judiciary's continued legitimacy. It admonishes judges to objectively uphold and apply

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71. See generally Robert S. Summers, *Legal Institutions in Professor H.L.A. Hart's Concept of Law*, 75 NOTRE DAME L. REV. 1807, 1825 (2000) ("The concept of the appropriate procedural form of adjudication goes far to represent the very heart of adjudication—adversarial party preparation and presentation pursuant to dialogic procedure known in advance, with the judge deciding the issues objectively on the basis of the presentations.").

72. Charles G. Geyh, *Judicial Ethics and the Conduct of Judges*, in *LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION* § 6-1.1 et seq. (2018).

73. MODEL CODE OF JUD. CONDUCT, Canon 1, R. 1.2 (AM. BAR ASS'N 2018).

the law, even as it acknowledges that “each judge comes to the bench with a unique background and personal philosophy”—which it urges judges to control.<sup>74</sup> It directs judges “not [to] be swayed by public clamor or fear of criticism”<sup>75</sup>—a directive that is increasingly challenging to follow in a partisan and polarized political environment where impending judicial elections may jeopardize a judge’s tenure in office. It urges judges “not [to] permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”<sup>76</sup> The Code authorizes, but nonetheless regulates, a judge’s civic, charitable, fraternal, financial, governmental, educational, and other extrajudicial activities, to the end of ensuring that they do not “appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”<sup>77</sup> And the Code seeks to broker an uneasy accord between the judge’s need to run for office, as politicians do, without behaving like other politicians in ways “inconsistent with the independence, integrity, or impartiality of the judiciary.”<sup>78</sup> Taken together, these rules, reconceptualized to regulate judicial ethics in a legal culture paradigm, serve as a foundation upon which a reform agenda can be built.

#### IV. THE SEARCH FOR SOLUTIONS

Armed with a new paradigm that reconceptualizes the role of judges and the courts, we can devise a plan for its implementation. A sensible plan of attack in addressing the general public’s antipathy toward the role of courts and judges should include both indirect and direct approaches.

Indirect approaches promote the general public’s confidence in the judiciary through reforms within the judiciary’s control that ostensibly target other audiences. Thus, for example, rigorous ethical standards and disciplinary protocols established by judges for judges indirectly—but explicitly—seek to enhance the judiciary’s legitimacy with the general public. The same may be said for procedural reforms that improve access to justice for litigants in ways that bolster the general public’s confidence in the courts generally.

The following are some indirect reforms to consider:

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74. *Id.* Canon 2, R. 2.2 cmt. 2.

75. *Id.* Canon 2, R. 2.4(A).

76. *Id.* Canon 2, R. 2.4(B).

77. *Id.* Canon 3, R. 3.1(C).

78. *Id.* Canon 4.

1. The Supreme Court should quietly adopt a code of conduct. The optics of the nine most influential judges in the nation being the only nine who do not commit themselves to abiding by basic ethical norms creates unnecessary perception problems.<sup>79</sup>
2. Standardize disqualification procedures to reassure an increasingly skeptical public that the judiciary takes impartiality seriously. Substantive disqualification standards are uniform. Procedural disqualification standards are not.<sup>80</sup> Among procedural reforms to consider are the following: a) end the common practice of district judges ruling on their own disqualification motions,<sup>81</sup> which creates a public perception akin to students grading their own homework; b) stop treating disqualification as the bastard child and subject disqualification proceedings to the standard rigors of motions practice;<sup>82</sup> c) end the practice of appellate judges having the final word on their own disqualification;<sup>83</sup> d) reconsider the deferential standard of review that most appellate courts apply to non-disqualification by trial courts, particularly in jurisdictions where trial judges rule on their own biases.<sup>84</sup>
3. State and federal court systems should make judges' financial disclosure statements available online<sup>85</sup>—to do otherwise makes the

79. Charles G. Geyh & Stephen Gillers, *SCOTUS Needs a Code of Ethics*, POLITICO (Aug. 8, 2013, 5:20 AM), <https://www.politico.com/story/2013/08/the-supreme-court-needs-a-code-of-ethics-095301> [<https://perma.cc/6VE6-3T7R>].

80. Cynthia Gray, *Taking Disqualification Seriously*, 92 JUDICATURE 9, 9 (2008).

81. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 532–33 (2005) (“On many occasions during the past 200 years the public has focused on a judge’s questionable decision not to recuse and has found the laws governing that decision to be wanting.”).

82. See *id.* at 551–53 (“The recusal statutes will fail to protect the reputation of the judiciary as long as they are implemented in an ad hoc fashion, without the procedural protections that normally govern adjudication. For as long as they have existed, the recusal statutes have operated in a procedural vacuum. The laws do not provide for appropriate disclosure of relevant facts, an adversarial presentation of the issues, or a neutral decisionmaker who issues a reasoned opinion on the question of disqualification.” (footnote omitted)).

83. MATTHEW HERNANDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 2 (2016), <https://www.brennancenter.org/publication/judicial-recusal-reform-toward-independent-consideration-disqualification> [<https://perma.cc/D484-8GPD>].

84. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 531–32 (2007).

85. MODEL CODE OF JUD. CONDUCT, Canon 3, R 3.15(D) (AM. BAR ASS’N 2018).

courts look as though they are sandbagging. If there are privacy concerns about making disclosures in specified areas, deal with them directly.

4. Retool *Iqbal* and *Twombly*. Enabling judges to dismiss actions that their unguided “common sense” tells them are implausible invites public suspicion that plausibility is all in the eye of the beholder. If the federal courts are disinclined to reconsider the plausibility standard itself, add guidance to assist district judges in structuring plausibility determinations. When a plaintiff’s claim lacks plausibility because details critical to the claim are in the defendant’s control, consider experimenting with sharply truncated discovery for the limited purpose of affording plaintiff an opportunity to flesh out his claims.

The problem with indirect reforms is that they are indirect. They address the corrosive effects of the new politics at the margins in ways that seem almost trivial. The paradox the judiciary confronts is this: To better insulate itself from the rough and tumble of the new politics, which is critical to the courts’ long-term well-being, the judiciary needs to make cautious but direct forays into the political rough and tumble to better inform the public conversation.

The following are some direct reforms to consider:

1. Judges’ primary channel of communication with the general public is through the opinions they write. Consider drafting opinions as Justice Ginsburg does, with a lead paragraph that synthesizes your ruling succinctly and accurately,<sup>86</sup> which reduces the risk of

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86. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 587 (1999) (“This case concerns the proper construction of the anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.”); see also *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 173 (2000) (starting the majority opinion with a statement of the issue,

misunderstanding for readers—most importantly journalists—who lack the patience to read on. The alternative approach of writing opinions like thrillers, in which you save your conclusion for the action-packed climax, can create unnecessary mischief. Witness early reports of the Chief Justice’s majority opinion in the Affordable Care Act case, in which the press misreported that the Court had struck the Act down.<sup>87</sup>

2. Judges already speak directly to prospective jurors, school groups, and members of civic, fraternal, and charitable organizations, and codes of conduct encourage them to do so.<sup>88</sup> Keep it up and ramp it up. It is an opportunity to dispel misconceptions and transition to the new paradigm. Judges can talk about their lives in the law and how learning to think like a lawyer is a kind of immersion process that structures and limits how they think about legal problems. Trial judges can talk about how they differ from Supreme Court justices, about the constraints precedent imposes on them, and the relative infrequency with which they are called upon to decide novel, hotly contested questions of law. They can talk about the centrality of facts and factual allegations to what they do and the process of deciding easy and difficult cases. They can share their stories on the art of judging in hard cases, when they must bring discretion and judgment to bear. They can talk about how the decisions they make differ from those of public officials in the political branches, and why impartiality and independence are problematic for them but essential for judges. Federal judges can dispel the notion that life tenure makes them unaccountable. They can talk about appeal, mandamus, and the role that collegiality norms play in discouraging judges from abusing their authority and losing the respect of their colleagues. They can take

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the applicable rule of law, the procedural history of the case, the interpretation adopted by the Court, and the Court’s disposition).

87. See Brian Stelter, *CNN and Fox Trip Up in Rush to Get the News on the Air*, N.Y. TIMES (June 28, 2012), <https://www.nytimes.com/2012/06/29/us/cnn-and-foxs-supreme-court-mistake.html> [https://perma.cc/J7KC-7ANG] (“The national news media mostly got it right on Thursday in reporting the Supreme Court’s decision to uphold President Obama’s health care overhaul. But the cable news networks CNN and Fox News Channel initially got it wrong, causing consternation behind the scenes. In the rush to get the news out, both networks initially reported that the Supreme Court had struck down the law’s individual mandate, when in fact, in a 5-to-4 vote, the court had upheld the mandate as a tax.”).

88. MODEL CODE OF JUD. CONDUCT, Canon 1, R 1.2 cmt. 6 (AM. BAR ASS’N 2018).

credit for the improvements that the judicial conference has made in the disciplinary process, which better ensures that when a judge strays too far from the three I's, problems are identified and corrected.

3. It is time to enter the twenty-first century. Judicial systems should develop a constrained social media presence. It need not and should not defend judges or rulings *per se*; but it can inform public discussion of judges and rulings with tweets, posts, and blogs about the three I's, the role of a judge in adjudication, and how judges are different from public officials in the other branches.
4. To counter misguided attacks on judges and their rulings, court systems should consider cultivating relationships with allies who are free to speak their minds. For example, when the Indiana Supreme Court issued a controversial ruling that was widely misconstrued by critics, the Administrative Office's public affairs officer spoke with me about the issue and asked if they could refer press calls to me, which created an opportunity to address a potentially volatile situation without embroiling the judges themselves.

In my darker moments, I fear that any corrective information that the judiciary offers will be drowned out by sensationalized junk news. But it is worth recalling that when the nation was in its infancy, scurrilous publishers and pamphleteers were the internet trolls of their day. Towering intellects competed for attention with slithering demagogues, but in the end, it worked out. We celebrate the likes of Thomas Paine and relegate James Callender and his ilk to a footnote. The Internet remains the wild west of public life, and if the purveyors of junk news remain unchecked, the future looks grim. But I take heart from the nation's youth, who have begun to rise up, challenge the status quo, and demand a say in their future. Young, public-spirited conservatives, liberals, and moderates, who negotiate the virtual world better than their elders, are well positioned to tame the Internet and develop better means to police falsehoods.

